[ORAL ARGUMENT NOT YET SCHEDULED]

NO. 15-1029 (CONSOLIDATED WITH NO. 15-1046)

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

NOEL CANNING, A DIVISION OF THE NOEL CORPORATION,
Petitioner,

V.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

ON PETITION FOR REVIEW FROM A DECISION OF THE NATIONAL LABOR RELATIONS BOARD

BRIEF FOR PETITIONER NOEL

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May 14, 2015

CERTIFICATE OF PARTIES, RULINGS UNDER REVIEW, AND RELATED CASES

A. Parties.

1. Petitioner is Noel Canning ("Noel").

2. Respondent is the National Labor Relations Board.

B. Ruling Under Review.

The ruling under review was issued on December 16, 2014 by the National Labor Relations Board ("Board"). The Board ordered Noel to cease and desist from its purported refusal to bargain, and from otherwise interfering with employee rights under Section 7 of the National Labor Relations Act, and further ordered Noel to execute a collective bargaining agreement that was allegedly agreed upon orally on December 8, 2010. In issuing this ruling, the Board necessarily decided that it had jurisdiction to act under 29 U.S.C. §§ 160(e) and (f).

C. Related Cases.

Two other known petitions for review are pending in other circuits wherein the Petitioners have questioned the jurisdiction of the Board to act when a Circuit Court of Appeals has either vacated a prior decision of the Board without remanding the case to the Board for further proceedings, *see*, *Big Ridge, Inc. v. N.L.R.B.*, Case No. 15-1046 (7th Cir.), or has denied enforcement of a Board order without remanding the case to the Board for further proceedings, *see, Huntington*

Ingalls Inc. v. N.L.R.B., Case No. 14-2051 (4th Cir.). So far as Petitioner knows, there have not yet been any rulings in these cases.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Fed. R. App. P. 26.1 and D.C. Circuit Rule 26.1, Petitioner makes the following disclosures:

1. Petitioner Noel is a division of The Noel Corporation. Noel has no other parent corporations, and no other publicly-held company has a 10% or greater ownership interest in Noel. Noel is engaged in the manufacture and distribution of carbonated beverages (Pepsi products) in Central and Eastern Washington and Northern Oregon.

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JURISDICTIONAL STATEMENT

This is a Petition for Review by Noel Canning ("Noel") from an Order of the National Labor Relations Board ("Board") issued on December 16, 2014, *Noel Canning*, 361 NLRB No. 129 (2014) (the "2014 Order"). This Court has jurisdiction to review that Order under 29 U.S.C. § 160(e)-(f).

STATEMENT OF ISSUES

The questions presented by Noel's Petition are:

1. Whether the Board erred by issuing a ruling (the 2014 Order) against Noel because it lacked jurisdiction to so act;

2. Does the Board have jurisdiction to act and conduct further proceedings pursuant to 29 U.S.C. § 160(e)-(f) where its prior Decision and Order has been petitioned for review to, and vacated by, the Court of Appeals without an order remanding the case to the Board for further proceedings?

3. Whether the Board lacked jurisdiction to issue the 2014 Order after this Court granted Noel's petition for review of the 2012 Order, denied the Board's cross application for enforcement of that order, and issued its decision and mandate without remanding the case to the Board for further proceedings?

STATUTES AND REGULATIONS

All applicable provisions are contained in the Statutory Addendum to this Brief.

INTRODUCTION

This case raises the issue of whether the Board has jurisdiction to act and to conduct further proceedings where its prior Decision and Order was petitioned for review to this Court, and the prior Decision and Order was vacated by this Court without any order of remand to the Board.

On February 8, 2012 the Board issued a Decision and Order against Noel finding violations of Section 7 of the National Labor Relations Act and ordering certain relief ("2012 Order"). *Noel Canning*, 358 NLRB No. 4 (2012). (Appx. 1-9).

Noel petitioned for review; this Court vacated the Board's 2012 Order and denied the Board's cross petition for enforcement. *Noel Canning v. NLRB*, 705 F.3d 490, 515 (2013). On petition for certiorari by the Board the United States Supreme Court affirmed. *N.L.R.B. v. Noel Canning*, 134 S.Ct. 2550 (2014). Neither court's decision, judgment, or mandate remanded the matter to the Board for further proceedings. (Appx. 28-32).

Subsequently the Board reconsidered the case and issued a Decision and Order ("2014 Order") adopting and restating its prior vacated 2012 Order. *Noel Canning*, 361 NLRB No. 129 (2014). (Appx. 33-35).

Noel's position is that the Board had no jurisdiction to act further in the matter nor to issue the 2014 Order, absent an order of remand from this Court

given exclusive jurisdiction in the Court of Appeals and the "final" nature of this Court's decision under 29 U.S.C. § 160(e)-(f).

STATEMENT OF FACTS

1. The facts regarding the background and the history of this matter prior to the Board's 2014 Order are summarized in this Court's decision, *Noel Canning v. NLRB*, 705 F.3d 490 (D.C. Cir. 2013) and in the U.S. Supreme Court's decision, *N.L.R.B. v. Noel Canning*, ___ U.S.___, 134 S.Ct. 2550 (2014). However, certain salient facts are restated in the following paragraphs.

2. On January 4, 2012, the President purported to make intrasession "recess" appointments of Sharon Block, Terence Flynn, and Richard Griffin to the Board. At the time Chairman Pearce and Member Hayes had already been properly appointed to the Board. *Noel Canning*, 134 S.Ct. at 2557; *Noel Canning*, 705 F.3d at 498. *See* 156 Cong. Rec. S5, 281 (daily ed. June 22, 2010).

3. Following these appointments, on February 8, 2012 the Board (composed of Members Hayes, Flynn and Block) purported to issue a Decision and Order ("2012 Order") against Noel finding violations of Section 7 of the National Labor Relations Act ("Act"), 29 U.S.C. §151 et seq., and ordering certain relief, essentially affirming and adopting the recommended order of the administrative law judge as clarified and modified. *Noel Canning*, 358 NLRB No. 4 (2012). (Appx. 1-9).

4. Noel petitioned for review, challenging the validity of the 2012 Order on the ground, among others, that the Board could not lawfully act due to the absence of a quorum because three of the five members of the Board were never validly appointed under the Recess Appointments Clause of the Constitution. The Board cross petitioned for enforcement of its order. This Court upheld the challenge, "vacat[ing] the Board's order" and "deny[ing] the cross-petition of the Board for enforcement of its invalid order." *Noel Canning*, 705 F.3d at 515.

5. On review neither party (nor the union as intervenor for the Board) requested this Court to remand to the Board for further proceedings. Both were sophisticated and experienced litigants represented by experienced counsel. (Appx. 10-26).

6. On petition for certiorari by the Board the United States Supreme Court affirmed the judgment of this Court. *Noel Canning*, 134 S.Ct. at 2578.

7. Neither decision, judgment, or mandate remanded the matter to the Board for further proceedings. *Noel Canning*, 705 F.3d at 515; *Noel Canning*, 134 S.Ct. at 2578. (Appx. 28-32).

8. Notwithstanding, the Board (now composed of Chairman Pearce and Members Johnson and Schiffer) on its own initiative decided to "consider the case anew and… issue a decision and order resolving the complaint allegations." *Noel Canning*, 361 NLRB No. 129 (2014). (Appx. 33-35).

9. The Board claimed to have conducted a "de novo" review of the administrative law judge's decision and the record, agreed with the rationale of the previously vacated 2012 Order issued without a quorum of properly approved members, and affirmed and adopted the recommended order of the administrative law judge "to the extent and for the reasons stated in the Decision and Order reported at 358 NLRB No. 4, which is incorporated herein by reference." *Noel Canning*, 361 NLRB No. 129 (2014) (the 2014 Order). (Appx. 33).

10. The 2014 Order is word for word identical with the 2012 Order, with the exception of adding a subparagraph 1(e) ordering Noel to compensate all affected unit employees for the adverse tax consequences of receiving lump-sum backpay awards and to file a report with the Social Security Administration allocating those awards to the appropriate calendar quarters. *Compare*, *Noel Canning*, 358 NLRB No. 4 at 1-2 (2012), *with Noel Canning*, 361 NLRB No. 129 at 1-2 (2014). (Appx. 1-9, 33-35).

11. Review of the 2014 Order was timely brought to this court by Noel through its Petition for Review dated February 4, 2015 and received by this court on February 5, 2015. (USCA case #15-1029, document #1537553).

SUMMARY OF ARGUMENT

1. The Board had no jurisdiction to act and issue the 2014 Order absent an order of remand from this Court, given this Court's exclusive jurisdiction and the "final" nature of this Court's decision under 29 U.S.C. § 160(e)-(f).

2. Section 29 U.S.C. § 160(e)-(f) of the Act vests federal appellate courts with review authority of actions to enforce or review final Board orders. In such cases, the Board shall cause the administrative record to be filed with the appellate court and "upon the filing of the record with it the jurisdiction of the court shall be exclusive and its judgment and decree shall be final." 29 U.S.C. §160(e). This provision deprives the Board of authority to modify its orders and to take further action in a case once appellate review has been sought. It also allows litigants to rely on the finality of court decrees enforcing, or denying, the Board's orders "to the same extent that other litigants may rely on judgments for or against them." *Int' Union of Mine, Mill & Smelter Workers v. Eagle-Picher Mining & Smelting Co.,* 325 U.S. 335, 340 (1945) *("Eagle-Picher").*

3. "'[A]bsent a remand, the Board may neither reopen nor make additional rulings on a case once exclusive jurisdiction vests in the reviewing court.' *George Banta Company, Inc. v. NLRB,* 686 F.2d 10, 16 (D.C. Cir. 1982)." *NLRB v. Lundy Packing Co.,* 81 F.3d 25, 26 (4th Cir. 1996).

4. The Act makes clear that the Board was powerless to take further action without a remand from this Court. The Board's 2014 Order therefore was entered without jurisdiction, is void and cannot be enforced.

5. Any other result would disregard the express language of the Act. If Congress meant to grant the Board unilateral authority to reassert jurisdiction following appellate review, it could have so provided in the statute. But Congress did not grant the Board such power and it would be inappropriate for the Board - or this Court - to read into the Act an implied authority that is not there.

6. Nothing in this Court's or the Supreme Court's decision, judgment or mandate indicates the case was intended to be remanded to the Board for further action of any kind.

STANDING

Noel has standing because it is the party directly aggrieved by, and challenging, the 2014 Order.

ARGUMENT

I. STANDARD OF REVIEW

This Court's review of this exclusive jurisdiction issue is de novo, and it owes no deference to the Board's arguments. "A federal court owes no deference to an agency's interpretation of the court's subject matter jurisdiction. '[T]he Supreme Court has repeatedly affirmed that federal courts have an independent

obligation to determine their own subject-matter jurisdiction.'" *Cardiosom, L.L.C. v. U.S.*, 115 Fed.Cl. 761, 768 (2014) (internal citations omitted). *See Ledbetter v. Goodyear Tire & Rubber Co.,* 550 U.S. 618, 643, n. 11 (2007)("Agencies have no special claim to deference in their interpretation of our decisions."); *Reno v. Bossier Parish School Bd.,* 528 U.S. 320, 336, n. 5 (2000)(no deference owed to agency enforcement practice based in part on agency's interpretation of prior Supreme Court precedent).

Even if the Board had attempted to interpret the Act's jurisdictional provisions in its 2014 Order, "[i]f the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Chevron US.A. Inc. v. Natural Resources Defense Council, Inc.,* 467 U.S. 837, 842-43 (1984). Thus, "[i]f a court, employing traditional tools of statutory construction, ascertains that Congress had an intention on the precise question at issue, that intention is the law and must be given effect." *Id.* at 843, n.9; *see also Chamber of Commerce of the United States v. NLRB,* 721 F.3d 152, 160 (4th Cir. 2013) ("We are only to employ the deference of step two [of the *Chevron* analysis] when the devices of judicial construction have been tried and found to yield no clear sense of congressional intent.") (citations omitted). As such, when the meaning of a statute is unambiguous, a reviewing court owes no deference to the Board's chosen construction.

II. THE BOARD LACKED JURISDICTION TO ENTER THE 2014 ORDER

29 U.S.C. § 160(e) unambiguously states that "[upon] the filing of the [Board] record with [the court of appeals] the jurisdiction of the court shall be exclusive and its judgment and decree shall be final" except upon review by the Supreme Court. This plain text and decades of interpretive precedent, including by the Supreme Court, establish beyond question that when a Board order is challenged in a federal appellate court, the Board loses jurisdiction of the proceeding.

This is not a case in which this Court must choose between competing interpretations of the Act. The Board cannot - and does not in the 2014 Order - dispute the fact that it lost jurisdiction once Noel challenged the 2012 Order and the administrative record associated with that Order was filed with this Court. And the Board cannot argue that some provision of the Act restored that jurisdiction.

Instead, the Board must necessarily argue that this Court's judgment and mandate in *Noel,* 705 F.3d 490, is consistent with an implication that the Court remanded, or with the notion that the Board could take further action in the case despite the clear absence of a remand. This distinction is important, because it means the Board's implicit conclusion it had authority to issue the 2014 Order is

not based on an interpretation of the Act. Instead, any such analysis must be based on a strained and unsupported reading of this Court's decision and mandate.

This court's decision in *Noel* denies enforcement of the 2012 Order and vacates the Board's order. Whatever the Board thinks this Court meant to say, or should have said, beyond that is meaningless. The Act is clear on this point - *all* of the Court's judgment, including the absence of a remand to the Board, is *final*. The case is over, the Board had no jurisdiction to issue the 2014 Order, and this Court cannot enforce the 2014 Order.

A. The Language Of The Act Plainly Vested This Court With Exclusive Jurisdiction Over The 2012 Order And The Board Had No Jurisdiction To Act Without A Remand

The Court need look no further than the unambiguous text of the Act to dispose of the Board's 2014 Order. The Act accords the Board the exclusive power to investigate and prosecute conduct proscribed by the Act's unfair labor practice provisions. 29 U.S.C. §160(a). It authorizes the Board to convene hearings; take evidence; make findings of fact; issue orders directing persons who have violated the Act to cease and desist from further misconduct; and take whatever affirmative actions the Board believes is necessary to remedy substantiated violations. 29 U.S.C. §§160(b)-(c).

However, Board orders are not self-enforcing as the Board must petition the federal appellate courts for enforcement. 29 U.S.C. §160(e). The Act requires that

after filing such a petition, the Board "shall file in court the record in the proceedings." *Id.*

Until such time as the record is filed, "the Board may at any time upon reasonable notice and in such manner as it shall deem proper, modify or set aside, in whole or in part, any finding or order made or issued by it." 29 U.S.C. §160(d). However, "[u]pon the filing of the record with it the jurisdiction of the court shall be *exclusive and its judgment and decree shall be final, except that the same shall be subject to review by the... Supreme Court.... upon writ of certiorari or certification as provided in section 1254 of Title 28*." 29 U.S.C. §160(e) (emphasis added).

At that point, the appellate court has *discretionary* remand authority. *Ford Motor Co. v. NLRB,* 305 U.S. 364, 372 (1939) (if a court sets aside findings and order of the Board "the court *could have* remanded the cause for further proceedings in conformity with its opinion." (Emphasis added)); *Laclede Gas Company v. NLRB*, 421 F.2d 610, 617 (8th Cir. 1970) ("In the light of 29 U.S.C. §160(e) and 28 U.S.C. §2106, we perceive no jurisdictional limitation on our right to remand to the Board for the stated purposes."). The court "shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter a decree enforcing, modifying and enforcing as so modified, or setting aside in whole or in part the order of the Board." 29 U.S.C. §160(e). The

powers of the court in this regard are broad. 29 U.S.C. §160(h) (in exercising the foregoing powers "the jurisdiction of courts sitting in equity should not be limited by chapter 6 of this title.").

But the statute does not say - or even suggest - the Court of Appeals is ever *obligated* to return jurisdiction to the Board at any time, for any reason.

Thus, the Act's plain text confirms that once the administrative record of a Board proceeding is filed with the court of appeals, the Board loses jurisdiction. And, far from suggesting the Board may reclaim jurisdiction after the court issues its decision, the Act's text establishes the opposite is true: the court's "judgment and decree shall be final." 29 U.S.C. §160(e). Nothing in that clause even hints at any authority of the Board's to resume proceedings in a case without an express direction from the court that it may do so. The Board cannot reopen that final judgment, issue a new decision in a terminated case, and then demand a second shot at obtaining enforcement. "Judgments, within the powers vested in courts by the Judiciary Article of the Constitution, may not lawfully be revised, overturned or refused faith and credit by another Department of Government." *Chicago & Southern Air lines Inc. v. Waterman S.S. Corp.*, 333 U.S. 103, 113 (1948). The Board may not ignore this Courts' judgment, unilaterally assert jurisdiction, and proceed to re-decide a terminated case.

This conclusion is further supported by the discretionary remand language contained in the text of the statute pertaining to adducing additional evidence. The statute expressly *allows* the court of appeals, *in its sole discretion,* to remand a case to the Board for further evidentiary development if the Court deems it necessary. 29 U.S.C. §160(e) ("the court *may* order such additional evidence to be taken") (emphasis added). This eviscerates any contention that Congress intended for remands to be automatic or implied absent direction from the Court. Congress plainly knows how to devise a remand procedure. The fact that it chose to leave the disposition of Board proceedings to the Court's discretion places in proper context the statute's later provision that the Court's "judgment and decree shall be final."

Once jurisdiction vests in the court of appeals, it has the sole and final say over what happens next.

Further support for this position is provided by a distinguishing point made by the Supreme Court in *Eagle-Picher*, where the Court distinguished the NLRA from the statute governing the Federal Trade Commission. 325 U.S. at 342. The FTC's statute, the Court reasoned, "specifically allows the Commission to modify its order after it has become final … by court decree". *Id.* The NLRA, by contrast, does not afford the Board such power. *Id.* That difference means "[t]here is no question that the [NLRA] intended to vest exclusive jurisdiction in the courts once

the Board in the exercise of its discretion had reached its determination and applied for enforcement." *Id.*

In this regard, "it is a fundamental rule of statutory construction that 'when Congress includes a specific term in one section of the statute but omits it in another, it should not be implied where it is excluded.' " *Cramer v. Commissioner,* 64 F.3d 1406, 1412 (9th Cir. 1995) (quoting *Arizona Elec. Power Co-op, Inc. v. United States,* 816 F.2d 1366, 1375 (9th Cir. 1987)); *see also, City of Chicago v. Environmental Defense Fund,* 511 U.S. 328, 338 (1994) ("It is generally presumed that Congress acts intentionally and purposely when it includes particular language in one section of a statute but omits it in another."); *Keene Corp. v. United States,* 508 U.S. 200, 208 (1993); *Rodriguez v. United States,* 480 U.S. 522, 525 (1987).

The logic of this principle applies to the language of 29 U.S.C. §160(e): Congress chose to leave the question of remand to the discretion of the court of appeals. It then chose to state unequivocally that the judgment of the court of appeals "shall be final." If Congress meant to allow the Board to automatically reclaim jurisdiction without a remand, or make remand obligatory or automatic in certain cases, it would have said so. In this regard, this Court "[does] not presume a delegation of power simply from the absence of an express withholding of power." *Chamber of Commerce of the United States,* 721 F.3d at 160.

The courts of appeal know how to issue decisions ordering remand for further proceedings when they so choose. Some courts have issued decisions vacating and/or refusing to enforce Board orders based on the *Noel Canning* reasoning without choosing to remand the matter to the Board, including this court: *Noel Canning v. NLRB,* 705 F.3d 490 (D.C. Cir. 2013); *Big Ridge, Inc. v. N.L.R.B.*, 561 Fed.Appx. 563 (7th Cir. 2014); *NLRB v. Enterprise Leasing Company Southeast LLC*, 722 F.3d 609 (4th Cir. 2013). Other courts have chosen to issue such post-*Noel* decisions or orders expressly providing for remand. *Entergy Mississippi Inc. v. NLRB*, 576 Fed.Appx. 415, n. 1 (5th Cir. 2014) (citing orders from 2nd, 3rd, 8th, 9th and 10th circuits). This Court has clearly chosen the former approach.

Similarly, the United States Supreme Court knows how to order remand to the courts of appeal and to the Board when that is the intent. *E.g.*, *Sure-Tan, Inc. v. NLRB*, 467 U.S. 883, 906 (1984). It did not do so here.

B. The Board's Own Rules Confirm That Remand By The Court Is Necessary For Jurisdiction

The Board's own procedural regulations confirm it understands this limitation. Its procedural regulation on "Judicial review of Board decision and order" states that the Court of Appeals "may enforce, modify, or set aside in whole or in part the Board's findings and order, or it may remand the case to the Board for further proceedings *as directed by* the Court." 29 C.F.R. §101.14 (emphasis

added). Indeed, the Board has even acknowledged that it lacks jurisdiction following judicial review. *See, e.g., Haddon House Food Prods., Inc.,* 260 NLRB No. 146 (1982) (refusing request to modify Board order: "Since . . . the Board's Order has already been enforced [by the appellate court], we no longer possess jurisdiction to modify that Order."); *Royal Typewriter Co.*, 239 NLRB No. 1 (1978) (same).

The language of 29 U.S.C. §160(e) compels rejection of the 2014 Order. Its meaning is clear and unambiguous. The Board lost jurisdiction of the 2012 Order when the record was filed in this Court. This Court then denied enforcement and vacated the 2012 Order. Its "judgment and decree," which became "final" at that point, did not provide for a remand. It thus does not matter whether this Court *should have remanded. This Court did not remand.* That ends the inquiry.

C. Binding Precedent Establishes That The Board Cannot Unilaterally Reclaim Jurisdiction Without Remand As It Purports To Do Here

It has been settled law for over 70 years that the Board cannot reclaim jurisdiction over a case without the express direction of the Court of Appeals. In *Eagle-Picher,* the Board found several employers guilty of unfair labor practices and ordered them to reinstate a number of employees with back pay. *Eagle-Picher,* 325 U.S. at 336. The employers petitioned the Eighth Circuit for review of the Board's order; the court largely agreed with the Board and enforced the majority of

the order without ordering remand. *Eagle-Picher Mining & Smelting Co. v. NLRB,* 119 F.2d 903, 915 (8th Cir. 1941). The employer paid the monies owed. *Eagle-Picher,* 325 U.S. at 337.

Two years later, the Board claimed it miscalculated the back pay and that the employer should have paid the employees more money. *Eagle-Picher Mining & Smelting Co. v. NLRB*, 141 F.2d 843, 844 (8th Cir. 1944). It petitioned the Eighth Circuit to vacate the portion of its order dealing with back pay and to remand the case to the Board. *Id.* at 843. The employers resisted the petition, challenging, among other things, "the jurisdiction of the court to vacate its decree." *Eagle-Picher,* 325 U.S. at 338. The court dismissed the Board's petition, and the union sought certiorari. *Id.*

The Supreme Court affirmed. The Court framed the "important question presented" as whether, following a final appellate court decree, the Board "retains a continuing jurisdiction to be exercised whenever, in its judgment, such exercise is desirable and may, therefore, oust the jurisdiction of the court and recall the proceeding for further hearing and action." *Eagle-Picher,* 325 U.S. at 339. Answering negatively, the Court initially noted:

> We are not dealing here with an administrative proceeding. That proceeding has ended and has been merged in a decree of a court pursuant to the directions of the National Labor Relations Act. The statute provides that if, in the enforcement proceeding, it appears that any

> further facts should be developed the court may remand the cause to the Board for the taking of further evidence and for further consideration. But it is plain that the scheme of the Act contemplates that when the record has been made and is finally submitted for action by the Board the judgment 'shall be final.' It is to have all the qualities of any other decree entered in a litigated cause upon full hearing, and is subject to review by this court on certiorari as in other cases. *The position of the [union] is, and necessarily must be, that, while the court's decree is final as respects the matter of the alleged unfair labor practices found by the Board, it is never final as respects the relief prescribed by the Board. It must follow that at any time, however remote, and for any reason satisfactory to the Board, it may recall the proceeding from the Circuit Court of Appeals insofar as concerns the relief granted and start afresh as if an enforcement decree had never been entered.*

Id. at 339-340, 342 (emphasis added). In rejecting the union's position the Supreme Court observed that absent remand, the Board could not act:

> *After the case has come under the jurisdiction of the court, either party may apply to the court for remand to the Board. There is no dearth of discretion or opportunity for its exercise, but opportunity should not be unlimited.* If the [union is] right, it must follow that in any case in which the court refuses to remand, the Board need merely wait until the "final" decree is entered and then proceed to resume jurisdiction, ignore the courts decree, and come again to it, asking its imprimatur on a new order.

Id. at 341. (Emphasis added). The Supreme Court additionally opined that allowing the Board to reopen proceedings without such direction from the court of appeals would degrade the rights of Board litigants to rely on court decrees enforcing or

denying Board orders: "The party adverse to the administrative body is entitled to rely on the conclusiveness of a decree entered by a court to the same extent that other litigants may rely on judgments for or against them." *Id.* at 340. The Supreme Court concluded that the Board's primary objection to the Eighth Circuit's ruling, that it does "not permit[] [the Board] to exercise its admittedly wide discretion a second time, or any number of times it may choose," was untenable:

> *There is no question that the Act intended to vest exclusive jurisdiction in the courts once the Board in the exercise of his discretion had reached its determination and applied for enforcement.* This prevents conflict of authority. Ford Motor Co. v. [NLRB], 305 U.S. 364.... In the Ford case, we said, "the authority conferred upon the Board by [29 U.S.C. §160(d)...] to modify or set aside its findings and order, ended with the filing in court of the transcript of record.... *But the [union] and the Board contend that although the court has entered its decree, the Board may resume jurisdiction in the same case when it pleases, disregarding the court's decree. This would, indeed, be a peculiar scheme of jurisdiction, devised to prevent interference with the court while it is deliberating to determine what is decree shall be, but allowing the decree to be ignored after it is entered.*

Id. at 342-343 (emphasis added). *Accord*, *Ford Motor Co.,* 305 U.S. at 372 (under 29 U.S.C. §160(e) "we think it is clear that the court was possessed of exclusive jurisdiction of the administrative proceeding 'and of the question determined therein'"; if a court sets aside findings and order of the Board, remand is discretionary: "the court *could have* remanded the cause for further proceedings in conformity with its opinion." (Emphasis added)).

Since *Eagle-Picher,* this Court has rejected Board jurisdiction following issuance of a final court decree that does not order remand. *George Banta Company, Inc. v. NLRB,* 686 F.2d 10, 16 (D.C. Cir. 1982) *("George Banta")* ("Absent a remand, the Board may neither reopen nor make additional rulings on a case once exclusive jurisdiction vests in the reviewing court . . . If approved or enforced by a reviewing court, a Board order necessarily becomes an order of the court, and the court rather than the Board has jurisdiction to enforce compliance." (Citing *Service Employees Int'l Union Local 250 v. NLRB,* 640 F.2d 1042, 1043-46 (9th Cir. 1981)).

This Court's decision in *George Banta* is in accord with the decisions of other circuit courts of appeal that likewise have followed the Supreme Court's interpretation of 29 U.S.C. §160(e) in *Eagle-Picher.* In *NLRB v. Lundy Packing Co.,* 68 F.3d 1577 (4th Cir. 1995) *("Lundy* I"), the court refused to enforce the Board's order excluding certain workers from a bargaining unit vote; the record did not "reveal how the challenged votes might have affected the election outcome." *Id.* at 1579. The court did not remand the case for further proceedings. *Id.*

Subsequently, the Board attempted to revive the representation case proceeding and the employer moved to stay further action by the Board. *NLRB v. Lundy Packing Co.,* 81 F.3d 25 (4th Cir. 1996) *("Lundy II").* On review, the court held the Board lacked jurisdiction to conduct further proceedings because the court

had not remanded the case (and indeed "at no time did the Board ever suggest that a remand for counting the challenged ballots would be an appropriate alternative disposition of the case"). *Id.* at 26. Relying on *Eagle-Picher,* the Court rejected the Board's claim of jurisdiction and stated:

> Absent a remand, the Board may neither reopen nor make additional rulings on a case once exclusive jurisdiction vests in the reviewing court." *George Banta*.... This is because "[i]n... 29 U.S.C. §160(e), Congress provided that '[u]pon the filing of the record with [the Court of Appeals] the jurisdiction of the court shall be exclusive in this judgment and decree shall be final.' *Service Emp. Intern. Union Local 250, AFL-CIO v. NLRB,* 640 F.2d 1042, 1044 (9th Cir. 1981) (Kennedy, J.). As the Supreme Court has noted, when a "proceeding has ended and has been merged in a decree of a court pursuant to the direction of the [NLRB]... [i]t is to have all the qualities of any other decree entered in a litigated cause upon full hearing, and is subject to review by this Court on certiorari as in other cases. [*Eagle-Picher*].
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> ...
>
> Thus, the attempt by the Board to revive the representation petition and the election that followed exceeds the Board's jurisdiction. Following our decision in *Lundy*, "[t]he Board had no jurisdiction to modify the remedy." *W.L. Miller Co. v. N.L.R.B.*, 988 F.2d 834, 837 (8th Cir. 1993). Indeed, any other approach would result in endless rounds of piecemeal litigation and frustrate the ability of the Supreme Court to review final decisions of this court.
>
> ... We reiterate our earlier order that enforcement of the Board's bargaining order is denied and that this case is closed in all respects.

81 F.3d at 26-27. The Board was not satisfied with this explanation and filed a motion to reconsider. The Court responded:

> *While the Board contends that our decision constituted some sort of remand, nowhere in our opinion did we so indicate . . . it is unusual that the Board would have interpreted our disposition as implicitly providing such a remedy* . . . the Board acted in clear contravention of its jurisdictional limits and sought to bypass this court . . . Here . . . the Board . . . simply proceeded to conduct further proceedings on its own initiative. As we explained in our order . . . the Board had no such authority.

Perdue Farms, Inc. v. NLRB, 935 F.Supp. 713, 722 (E.D. N.C. 1996) (quoting *NLRB v. Lundy Packing Co.,* No. 95-1364(L)(12-CA-16618) (4th Cir. Mar. 21, 1996)) (emphasis added).

See, also, W.L. Miller Company v. NLRB, 988 F.2d 834, 837 (8th Cir. 1993) ("The Board had no jurisdiction to modify the remedy after judicial enforcement . . . *Eagle-Picher* makes clear that with the issuance of our opinion and judgment, and expiration of the time for certiorari, the dispute was finally adjudicated.... None of the parties applied to this court for remand as provided in 29 U.S.C. §160(e)..., a fact the Supreme Court stressed in *Eagle-Picher"*); *Service Employees Int'l Union Local 250 v. NLRB,* 640 F.2d 1042, 1043-36 (9th Cir. 1981) (prior appellate judgment in favor of employer vacating Board's order finding an unfair labor practice under NLRA sections 8(a)(1), (4), (5) without remanding for

further proceedings; union later contended the Board had jurisdiction to consider a violation of section 8(a)(3). Held: "[W]e think it follows [from *Eagle-Picher*] that, absent an order to remand or some express qualification in the judgment, finality is presumed."). *See*, *Flav-O-Rich, Inc. v. NLRB*, 531 F.2d 358, 361 (6th Cir. 1976) (NLRB order clarifying prior decision signed while prior decision was on review to the Circuit Court of Appeals "patently defective since it was entered at a time when the Board was without jurisdiction to modify its earlier decree.").

Mobil Oil Corp. v. Federal Power Commission, 417 U.S. 283 (1974), applying like provisions of the Natural Gas Act, 15 U.S.C. §717 et. seq., also supports this position. In *Mobil Oil*, the Federal Power Commission issued a rate order in 1968; on appeal the court of appeals affirmed with "serious misgivings." 417 U.S. at 293-294. However, the court of appeals specifically stated that its judgment did not foreclose the Commission from making changes to its 1968 order because of rapidly changing market supply conditions. *Id.* at 294-296. Subsequently, the commission reopened the proceeding, withdrew the 1968 order, and issued a new 1971 order, which was affirmed by the court of appeals. *Id.* at 288-292, 298.

On petition for review to the U.S. Supreme Court, the State of New York and various municipal gas distributors challenged the statutory authority of the Commission to adopt the 1971 order, arguing that the Commission had no power

to act further after the issuance of the 1968 order and the "unqualified" affirmance by the court of appeals because under the Natural Gas Act "[t]he judgment and decree of the [court of appeals] affirming, modifying, or setting aside, in whole or in part, any such order of the Commission, shall be final, subject to review by the Supreme Court... upon certiorari....". 417 U.S. at 309-310, n. 44 (quoting 15 U.S.C. § 717r(b)). The Court disagreed, observing had the court of appeals not directed that the Commission could revisit its prior order, the Commission had no power to act: "But the affirmance of the 1968 order was not 'unqualified.' *Although the Commission could not have reopened the order on its own*... the Court of Appeals' opinion on rehearing made it 'crystal clear' that, despite the form of the court's judgment, the Commission was fully authorized to reopen any part of the 1968 order that seemed appropriate and necessary...." *Id.* at 310-311 (emphasis added).

D. The Board Cannot Claim It Can Imply Jurisdiction To Act Based On This Court's Ruling; This Ignores Prevailing Precedent And Is Owed No Deference

1. The Act Does Not Permit The Board To Imply Remand From This Court's Decision

The Board cannot deny that it lost jurisdiction to this Court when it filed the administrative record as 29 U.S.C. §160(e) requires. The Board may argue that this Court's prior decision at 705 F.3d 490 vacating the 2012 order somehow returned matters to the Board. The Board may assert that interpreting this Court's

decision as allowing further administrative proceedings is "consistent" with this Court's decision because this Court's vacation of the 2012 order was not based on the merits of the unfair labor practice findings, but only on the Recess Appointments Clause issue.

Accepting this premise would divide the Court's mandate in half and read into this Court's decision an implied remand that not only is not there, but that the Act plainly does not allow. Moreover, *Eagle-Picher* rejects the Board's "half a loaf" reading of this Court's decision. At the close of the majority opinion, Justice Roberts noted:

> Unless the National Labor Relations Act so requires, the Board was not entitled, as of right, to have the decree it had procured set aside in part and the cause remanded for trial de novo in part. *There is nothing in the Act to indicate that such a decree is dual in character; part of it final and part of it subject to vacation and reexamination by the Board* regardless of the showing made to the court and regardless of the view the court holds as to the propriety of such vacation.

Eagle-Picher, 325 U.S. at 343-44 (emphasis added).

The *Eagle-Picher* Court recognized that an appellate decree that enforces or denies a Board order cannot be read, as the Board suggests, as being "final" in some respects, but not others. *Eagle-Picher*, and its progeny in the circuit courts of appeal, teach that if the court of appeals believes remand for further proceedings is

appropriate, *the court of appeals must so direct*. Failing such direction, the plain terms of 29 U.S.C. §160(e) leave the Board powerless to act.

Moreover, the assertion by an agency of "implied powers" to alter final decisions governed by a specific statutory scheme is disfavored; rather finality and certainty are favored. *Civil Aeronautics Bd. v. Delta Air Lines Inc.,* 367 U.S. 316, 321-331 (1961) (rejecting an implied exception to statutorily limited Board review of airline certificate orders issued under the FAA). "[T]he instructions set out in the statute are to be followed scrupulously." *Id.* at 325.

2. Allowing The Board To Read This Court's Judgment And Mandate As Allowing Further Proceedings Would Diminish The Concept of Finality And Prejudice Litigants For Complying With The Plain Meanings Of Court Judgments

Accepting an interpretation of this Court's opinion as allowing further proceedings not only would upend the careful balance of jurisdictional power Congress created in 29 U.S.C. §160(e), but also would punish parties for relying on this Court's judgments. One of the *Eagle-Picher* Court's chief concerns was that allowing the Board to reopen cases after appellate review but without remand would compromise employers' ability "to rely on the conclusiveness of a decree entered by a court to the same extent that other litigants may rely on judgments for or against them." *Eagle-Picher,* 325 U.S. at 340. The Court remarked on "how unfair it would be" to allow the Board to modify its judgment after the employer

there elected to comply with the appellate court's judgment rather than seek Supreme Court review. *Id.* at 343.

Moreover, here the Board *did* seek a petition for certiorari, and its petition focused exclusively on the Recess Appointments Clause issue. The Board (and the union, both experienced and sophisticated litigants and represented by experienced counsel) did not request remand in the briefing before this Court on the prior review. Nor did the Board ever suggest the Supreme Court should review the absence of remand by this Court. The Supreme Court affirmed this Court's decision which did not order remand, nor did the Supreme Court order remand. No court, at any point, has suggested that part of this case remained alive for the Board to resurrect at its discretion.

The Board may try to claim jurisdiction based on the fact that this Court found that the Board's 2012 decision should be vacated because of a "mere technicality" i.e. that it was constitutionally deficient. There is no "non-merits" exception to the statutory language in 29 U.S.C. §160(e) that this Court's "judgment and decree shall be final". Furthermore, this Court's prior ruling in this case does not prevent the filing of additional charges should they be warranted, nor prevent the employer and union from returning to the bargaining table.

Regardless, it is irrelevant whether the proper course for this Court *should* have been to remand, or whether "fairness" called for a remand. No requests were

ever made by the Board or union to remand the matter to the Board. This Court did not remand, nor did the Supreme Court. This Court vacated the Board's order, denied the Board's petition for enforcement, and the Supreme Court affirmed, nothing more.

Far too much water has gone over the dam for the Court to go back and undo its judgment now. The term at which this Court's decision and judgment was entered "has long since expired," *Eagle-Picher,* 325 U.S. at 343, and Noel is entitled to rely on the finality of that decree. There is no ambiguity to construe in the judgment or mandate in this case. The parties should be able to rely on the clear words of this Court's judgment. Conversely, the Board is bound to respect this Court's dictate, *including what it does not provide.* That is because "[t]he mandate of a court issuing a final judgment carries force beyond a victory in that immediate court." *QUALCOMM Inc., v. FCC,* 181 F.3d 1370, 1378 (D.C. Cir. 1999). It is the "final and indisputable basis of action as between the [administrative agency] and the [opposing party]." *Id.*

CONCLUSION

If the Board's position is correct, "it must follow that in any case in which the court refuses to remand, the Board need merely wait until the 'final' decree is entered and then proceed to resume jurisdiction, ignore the court's decree, and come again to us, asking its imprimatur on a new order." *Eagle Picher,* 325 U.S. at

341. But the Board is not correct. The Supreme Court rejected just such a contention, and the clear words of the Act establish the fallacy of the Board's attempt to reassert jurisdiction in this case.

For the foregoing reasons, Noel respectfully requests that the Court grant its Petition for Review, deny the Board's Cross-Application for Enforcement, hold that the Board's 2014 Order was entered without jurisdiction and that the order be vacated, and enter a judgment stating that the Board no longer has jurisdiction of this matter and that the case is closed in all respects.

Dated: May 14, 2015

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 32(a)(7)(C) of the Federal Rules of Appellate Procedure, I hereby certify that the textual portion of the foregoing brief (exclusive of the opening certificate, disclosure statement, tables of contents and authorities, certificates of service and compliance, and statutory addendum but including footnotes) contains 6985 words as determined by the word-counting feature of Microsoft Word.

Dated: May 14, 2015

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CERTIFICATE OF SERVICE

I hereby certify that on the 14th day of May, 2015, on behalf of Petitioner Noel Canning, I electronically filed the foregoing document with the Clerk of the United States Court of Appeals for the District of Columbia Circuit by using the CM/ECF system, which will send notification of such filing to the following counsel:

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STATUTORY ADDENDUM

15 U.S.C.A. § 717r

Effective: August 08, 2005

United States Code Annotated Currentness
Title 15. Commerce and Trade
Chapter 15B. Natural Gas (Refs & Annos)

➡ § 717r. Rehearing and review

(a) Application for rehearing; time

Any person, State, municipality, or State commission aggrieved by an order issued by the Commission in a proceeding under this chapter to which such person, State, municipality, or State commission is a party may apply for a rehearing within thirty days after the issuance of such order. The application for rehearing shall set forth specifically the ground or grounds upon which such application is based. Upon such application the Commission shall have power to grant or deny rehearing or to abrogate or modify its order without further hearing. Unless the Commission acts upon the application for rehearing within thirty days after it is filed, such application may be deemed to have been denied. No proceeding to review any order of the Commission shall be brought by any person unless such person shall have made application to the Commission for a rehearing thereon. Until the record in a proceeding shall have been filed in a court of appeals, as provided in subsection (b) of this section, the Commission may at any time, upon reasonable notice and in such manner as it shall deem proper, modify or set aside, in whole or in part, any finding or order made or issued by it under the provisions of this chapter.

(b) Review of Commission order

Any party to a proceeding under this chapter aggrieved by an order issued by the Commission in such proceeding may obtain a review of such order in the court of appeals of the United States for any circuit wherein the natural-gas company to which the order relates is located or has its principal place of business, or in the United States Court of Appeals for the District of Columbia, by filing in such court, within sixty days after the order of the Commission upon the application for rehearing, a written petition praying that the order of the Commission be modified or set aside in whole or in part. A copy of such petition shall forthwith be transmitted by the clerk of the court to any member of the Commission and thereupon the Commission shall file with the court the record upon which the order complained of was entered, as provided in section 2112 of Title 28. Upon the filing of such petition such court shall have jurisdiction, which upon the filing of the record with it shall be exclusive, to affirm, modify, or set aside such order in whole or in part. No objection to the order of the Commission shall be considered by the court unless such objection shall have been urged before the Commission in the application for rehearing unless there is reasonable ground for failure so to do. The finding of the Commission as to the facts, if supported by substantial evidence, shall be conclusive. If any party shall apply to the court for leave to adduce additional evidence, and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for failure to adduce such evidence in the

15 U.S.C.A. § 717r

proceedings before the Commission, the court may order such additional evidence to be taken before the Commission and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper. The Commission may modify its findings as to the facts by reason of the additional evidence so taken, and it shall file with the court such modified or new findings, which is supported by substantial evidence, shall be conclusive, and its recommendation, if any, for the modification or setting aside of the original order. The judgment and decree of the court, affirming, modifying, or setting aside, in whole or in part, any such order of the Commission, shall be final, subject to review by the Supreme Court of the United States upon certiorari or certification as provided in section 1254 of Title 28.

(c) Stay of Commission order

The filing of an application for rehearing under subsection (a) of this section shall not, unless specifically ordered by the Commission, operate as a stay of the Commission's order. The commencement of proceedings under subsection (b) of this section shall not, unless specifically ordered by the court, operate as a stay of the Commission's order.

(d) Judicial review

(1) In general

The United States Court of Appeals for the circuit in which a facility subject to section 717b of this title or section 717f of this title is proposed to be constructed, expanded, or operated shall have original and exclusive jurisdiction over any civil action for the review of an order or action of a Federal agency (other than the Commission) or State administrative agency acting pursuant to Federal law to issue, condition, or deny any permit, license, concurrence, or approval (hereinafter collectively referred to as "permit") required under Federal law, other than the Coastal Zone Management Act of 1972 (16 U.S.C. 1451 et seq.).

(2) Agency delay

The United States Court of Appeals for the District of Columbia shall have original and exclusive jurisdiction over any civil action for the review of an alleged failure to act by a Federal agency (other than the Commission) or State administrative agency acting pursuant to Federal law to issue, condition, or deny any permit required under Federal law, other than the Coastal Zone Management Act of 1972 (16 U.S.C. 1451 et seq.), for a facility subject to section 717b of this title or section 717f of this title. The failure of an agency to take action on a permit required under Federal law, other than the Coastal Zone Management Act of 1972, in accordance with the Commission schedule established pursuant to section 717n(c) of this title shall be considered inconsistent with Federal law for the purposes of paragraph (3).

(3) Court action

If the Court finds that such order or action is inconsistent with the Federal law governing such permit and would prevent the construction, expansion, or operation of the facility subject to section 717b of this title or section 717f of

15 U.S.C.A. § 717r

this title , the Court shall remand the proceeding to the agency to take appropriate action consistent with the order of the Court. If the Court remands the order or action to the Federal or State agency, the Court shall set a reasonable schedule and deadline for the agency to act on remand.

(4) Commission action

For any action described in this subsection, the Commission shall file with the Court the consolidated record of such order or action to which the appeal hereunder relates.

(5) Expedited review

The Court shall set any action brought under this subsection for expedited consideration.

CREDIT(S)

(June 21, 1938, c. 556, § 19, 52 Stat. 831; June 25, 1948, c. 646, § 32(a), 62 Stat. 991; May 24, 1949, c. 139, § 127, 63 Stat. 107; Aug. 28, 1958, Pub.L. 85-791, § 19, 72 Stat. 947; Aug. 8, 2005, Pub.L. 109-58, Title III, § 313(b), 119 Stat. 689.)

HISTORICAL AND STATUTORY NOTES

Revision Notes and Legislative Reports

1949 Acts. Senate Report No. 303 and House Report No. 352, see 1949 U.S. Code Cong. Service, p. 1248.

1958 Acts. Senate Report No. 2129, see 1958 U.S. Code Cong. and Adm. News, p. 3996.

2005 Acts. House Conference Report No. 109-190, see 2005 U.S. Code Cong. and Adm. News, p. 448.

Statement by President, see 2005 U.S. Code Cong. and Adm. News, p. S17.

References in Text

The Coastal Zone Management Act of 1972, referred to in subsec. (d)(1), (2), also known as CZMA, is Pub.L. 89-454, Title III, as added by Pub.L. 92-583, Oct. 27, 1972, 86 Stat. 1280, as amended, which is classified generally to chapter 33 of Title 16, 16 U.S.C.A. § 1451 et seq. For complete classification, see Short Title note set out under 16 U.S.C.A. § 1451 and Tables.

Codifications

15 U.S.C.A. § 717r

In subsec. (b), "section 1254 of title 28" substituted for "sections 239 and 240 of the Judicial Code, as amended [28 U.S.C. 346, 347]" on authority of act June 25, 1948, ch. 646, 62 Stat. 869, the first section of which enacted Title 28, Judiciary and Judicial Procedure.

Amendments

2005 Amendments. Subsec. (d). Pub.L. 109-58, § 313(b), added subsec. (d).

1958 Amendments. Subsec. (a). Pub.L. 85-791, § 19(a), added sentence providing that until record in a proceeding has been filed in a court of appeals, Commission may modify or set aside any finding or order issued by it.

Subsec. (b). Pub.L. 85-791, § 19(b), in second sentence, substituted "transmitted by the clerk of the court to" for "served upon", substituted "file with the court" for "certify and file with the court a transcript of", and inserted "as provided in section 2112 of Title 28", and, in third sentence, substituted "petition" for "transcript", and "jurisdiction, which upon the filing of the record with it shall be exclusive" for "exclusive jurisdiction".

Change of Name

Act June 25, 1948, as amended by Act May 24, 1949, substituted "court of appeals" for "circuit court of appeals" wherever appearing.

Transfer of Functions

Federal Power Commission terminated and functions, personnel, property, funds, etc., transferred to Secretary of Energy (except for certain functions transferred to Federal Energy Regulatory Commission) by sections 7151(b), 7171(a), 7172(a)(1), 7291, and 7293 of Title 42, The Public Health and Welfare.

15 U.S.C.A. § 717r, 15 USCA § 717r

Current through P.L. 113-296 (excluding P.L. 113-235, 113-287, and 113-291) approved 12-19-2014

END OF DOCUMENT

Effective:[See Text Amendments]

United States Code Annotated Currentness
Title 28. Judiciary and Judicial Procedure (Refs & Annos)
Part V. Procedure
Chapter 133. Review--Miscellaneous Provisions (Refs & Annos)
➞➞ § 2106. Determination

The Supreme Court or any other court of appellate jurisdiction may affirm, modify, vacate, set aside or reverse any judgment, decree, or order of a court lawfully brought before it for review, and may remand the cause and direct the entry of such appropriate judgment, decree, or order, or require such further proceedings to be had as may be just under the circumstances.

CREDIT(S)

(June 25, 1948, c. 646, 62 Stat. 963.)

Current through P.L. 113-296 (excluding P.L. 113-235, 113-287, and 113-291) approved 12-19-2014

END OF DOCUMENT

Effective:[See Text Amendments]

United States Code Annotated Currentness
Title 29. Labor
Chapter 7. Labor-Management Relations (Refs & Annos)
Subchapter II. National Labor Relations (Refs & Annos)
§ 160. Prevention of unfair labor practices

<Notes of Decisions for this section are displayed in two separate documents. Notes of Decisions for roman heads I through XI are contained in this document. For additional Notes of Decisions, see the second document for 29 USCA § 160.>

(a) Powers of Board generally

The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 158 of this title) affecting commerce. This power shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise: *Provided*, That the Board is empowered by agreement with any agency of any State or Territory to cede to such agency jurisdiction over any cases in any industry (other than mining, manufacturing, communications, and transportation except where predominantly local in character) even though such cases may involve labor disputes affecting commerce, unless the provision of the State or Territorial statute applicable to the determination of such cases by such agency is inconsistent with the corresponding provision of this subchapter or has received a construction inconsistent therewith.

(b) Complaint and notice of hearing; answer; court rules of evidence inapplicable

Whenever it is charged that any person has engaged in or is engaging in any such unfair labor practice, the Board, or any agent or agency designated by the Board for such purposes, shall have power to issue and cause to be served upon such person a complaint stating the charges in that respect, and containing a notice of hearing before the Board or a member thereof, or before a designated agent or agency, at a place therein fixed, not less than five days after the serving of said complaint: *Provided*, That no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board and the service of a copy thereof upon the person against whom such charge is made, unless the person aggrieved thereby was prevented from filing such charge by reason of service in the armed forces, in which event the six-month period shall be computed from the day of his discharge. Any such complaint may be amended by the member, agent, or agency conducting the hearing or the Board in its discretion at any time prior to the issuance of an order based thereon. The person so complained of shall have the right to file an answer to the original or amended complaint and to appear in person or otherwise and give testimony at the place and time fixed in the complaint. In the discretion of the member, agent, or agency conducting the hearing or the Board, any other person may be allowed to intervene in the said proceeding and to present testimony. Any such

proceeding shall, so far as practicable, be conducted in accordance with the rules of evidence applicable in the district courts of the United States under the rules of civil procedure for the district courts of the United States, adopted by the Supreme Court of the United States pursuant to section 2072 of Title 28.

(c) Reduction of testimony to writing; findings and orders of Board

The testimony taken by such member, agent, or agency or the Board shall be reduced to writing and filed with the Board. Thereafter, in its discretion, the Board upon notice may take further testimony or hear argument. If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this subchapter: *Provided,* That where an order directs reinstatement of an employee, back pay may be required of the employer or labor organization, as the case may be, responsible for the discrimination suffered by him: *And provided further,* That in determining whether a complaint shall issue alleging a violation of subsection (a)(1) or (a)(2) of section 158 of this title, and in deciding such cases, the same regulations and rules of decision shall apply irrespective of whether or not the labor organization affected is affiliated with a labor organization national or international in scope. Such order may further require such person to make reports from time to time showing the extent to which it has complied with the order. If upon the preponderance of the testimony taken the Board shall not be of the opinion that the person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue an order dismissing the said complaint. No order of the Board shall require the reinstatement of any individual as an employee who has been suspended or discharged, or the payment to him of any back pay, if such individual was suspended or discharged for cause. In case the evidence is presented before a member of the Board, or before an administrative law judge or judges thereof, such member, or such judge or judges as the case may be, shall issue and cause to be served on the parties to the proceeding a proposed report, together with a recommended order, which shall be filed with the Board, and if no exceptions are filed within twenty days after service thereof upon such parties, or within such further period as the Board may authorize, such recommended order shall become the order of the Board and become effective as therein prescribed.

(d) Modification of findings or orders prior to filing record in court

Until the record in a case shall have been filed in a court, as hereinafter provided, the Board may at any time upon reasonable notice and in such manner as it shall deem proper, modify or set aside, in whole or in part, any finding or order made or issued by it.

(e) Petition to court for enforcement of order; proceedings; review of judgment

The Board shall have power to petition any court of appeals of the United States, or if all the courts of appeals to which application may be made are in vacation, any district court of the United States, within any circuit or district, respectively, wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall file in the court the

record in the proceedings, as provided in section 2112 of Title 28. Upon the filing of such petition, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter a decree enforcing, modifying and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. If either party shall apply to the court for leave to adduce additional evidence and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the hearing before the Board, its member, agent, or agency, the court may order such additional evidence to be taken before the Board, its member, agent, or agency, and to be made a part of the record. The Board may modify its findings as to the facts, or make new findings by reason of additional evidence so taken and filed, and it shall file such modified or new findings, which findings with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive, and shall file its recommendations, if any, for the modification or setting aside of its original order. Upon the filing of the record with it the jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that the same shall be subject to review by the appropriate United States court of appeals if application was made to the district court as hereinabove provided, and by the Supreme Court of the United States upon writ of certiorari or certification as provided in section 1254 of Title 28.

(f) Review of final order of Board on petition to court

Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order in any United States court of appeals in the circuit wherein the unfair labor practice in question was alleged to have been engaged in or wherein such person resides or transacts business, or in the United States Court of Appeals for the District of Columbia, by filing in such a court a written petition praying that the order of the Board be modified or set aside. A copy of such petition shall be forthwith transmitted by the clerk of the court to the Board, and thereupon the aggrieved party shall file in the court the record in the proceeding, certified by the Board, as provided in section 2112 of Title 28. Upon the filing of such petition, the court shall proceed in the same manner as in the case of an application by the Board under subsection (e) of this section, and shall have the same jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper, and in like manner to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board; the findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall in like manner be conclusive.

(g) Institution of court proceedings as stay of Board's order

The commencement of proceedings under subsection (e) or (f) of this section shall not, unless specifically ordered by the court, operate as a stay of the Board's order.

(h) Jurisdiction of courts unaffected by limitations prescribed in chapter 6 of this title

When granting appropriate temporary relief or a restraining order, or making and entering a decree enforcing, modifying, and enforcing as so modified or setting aside in whole or in part an order of the Board, as provided in this section, the jurisdiction of courts sitting in equity shall not be limited by chapter 6 of this title.

(i) Repealed. Pub.L. 98-620, Title IV, § 402(31), Nov. 8, 1984, 98 Stat. 3360

(j) Injunctions

The Board shall have power, upon issuance of a complaint as provided in subsection (b) of this section charging that any person has engaged in or is engaging in an unfair labor practice, to petition any United States district court, within any district wherein the unfair labor practice in question is alleged to have occurred or wherein such person resides or transacts business, for appropriate temporary relief or restraining order. Upon the filing of any such petition the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper.

(k) Hearings on jurisdictional strikes

Whenever it is charged that any person has engaged in an unfair labor practice within the meaning of paragraph (4)(D) of section 158(b) of this title, the Board is empowered and directed to hear and determine the dispute out of which such unfair labor practice shall have arisen, unless, within ten days after notice that such charge has been filed, the parties to such dispute submit to the Board satisfactory evidence that they have adjusted, or agreed upon methods for the voluntary adjustment of, the dispute. Upon compliance by the parties to the dispute with the decision of the Board or upon such voluntary adjustment of the dispute, such charge shall be dismissed.

(l) Boycotts and strikes to force recognition of uncertified labor organizations; injunctions; notice; service of process

Whenever it is charged that any person has engaged in an unfair labor practice within the meaning of paragraph (4)(A), (B), or (C) of section 158(b) of this title, or section 158(e) of this title or section 158(b)(7) of this title, the preliminary investigation of such charge shall be made forthwith and given priority over all other cases except cases of like character in the office where it is filed or to which it is referred. If, after such investigation, the officer or regional attorney to whom the matter may be referred has reasonable cause to believe such charge is true and that a complaint should issue, he shall, on behalf of the Board, petition any United States district court within any district where the unfair labor practice in question has occurred, is alleged to have occurred, or wherein such person resides or transacts business, for appropriate injunctive relief pending the final adjudication of the Board with respect to such matter. Upon the filing of any such petition the district court shall have jurisdiction to grant such injunctive relief or temporary restraining order as it deems just and proper, notwithstanding any other provision of law: *Provided further*, That no temporary restraining order shall be issued without notice unless a petition alleges that substantial and irreparable injury to the charging party will be unavoidable and such temporary restraining order shall be effective for no longer than five days and will become void at the expiration of such period: *Provided further*, That such officer or regional attorney shall not apply for any restraining order under section 158(b)(7) of this title if a charge against the employer under section 158(a)(2) of this title has been filed and after the preliminary investigation, he has reasonable cause to believe that such charge is true and that a complaint should issue. Upon filing of any such petition the courts shall

cause notice thereof to be served upon any person involved in the charge and such person, including the charging party, shall be given an opportunity to appear by counsel and present any relevant testimony: *Provided further*, That for the purposes of this subsection district courts shall be deemed to have jurisdiction of a labor organization (1) in the district in which such organization maintains its principal office, or (2) in any district in which its duly authorized officers or agents are engaged in promoting or protecting the interests of employee members. The service of legal process upon such officer or agent shall constitute service upon the labor organization and make such organization a party to the suit. In situations where such relief is appropriate the procedure specified herein shall apply to charges with respect to section 158(b)(4)(D) of this title.

(m) Priority of cases

Whenever it is charged that any person has engaged in an unfair labor practice within the meaning of subsection (a)(3) or (b)(2) of section 158 of this title, such charge shall be given priority over all other cases except cases of like character in the office where it is filed or to which it is referred and cases given priority under subsection (l) of this section.

CREDIT(S)

(July 5, 1935, c. 372, § 10, 49 Stat. 453; June 23, 1947, c. 120, Title I, § 101, 61 Stat. 146; June 25, 1948, c. 646, § 32(a), (b), 62 Stat. 991; May 24, 1949, c. 139, § 127, 63 Stat. 107; Aug. 28, 1958, Pub.L. 85-791, § 13, 72 Stat. 945; Sept. 14, 1959, Pub.L. 86-257, Title VII, §§ 704(d), 706, 73 Stat. 544; Mar. 27, 1978, Pub.L. 95-251, § 3, 92 Stat. 184; Nov. 8, 1984, Pub.L. 98-620, Title IV, § 402(31), 98 Stat. 3360.)

Current through P.L. 113-296 (excluding P.L. 113-235, 113-287, and 113-291) approved 12-19-2014

END OF DOCUMENT

Code of Federal Regulations
Title 29. Labor
Subtitle B. Regulations Relating to Labor
Chapter I. National Labor Relations Board
Part 101. Statements of Procedures (Refs & Annos)
Subpart B. Unfair Labor Practice Cases Under Section 10 (a) to (i) of the Act and Telegraph Merger Act Cases

29 C.F.R. § 101.14

§ 101.14 Judicial review of Board decision and order.

Currentness

If the respondent does not comply with the Board's order, or the Board deems it desirable to implement the order with a court judgment, the Board may petition the appropriate Federal court for enforcement. Or, the respondent or any person aggrieved by a final order of the Board may petition the circuit court of appeals to review and set aside the Board's order. If a petition for review is filed, the respondent or aggrieved person must ensure that the Board receives, by service upon its Deputy Associate General Counsel of the Appellate Court Branch, a court-stamped copy of the petition with the date of filing. Upon such review or enforcement proceedings, the court reviews the record and the Board's findings and order and sustains them if they are in accordance with the requirements of law. The court may enforce, modify, or set aside in whole or in part the Board's findings and order, or it may remand the case to the Board for further proceedings as directed by the court. Following the court's judgment, either the Government or the private party may petition the Supreme Court for review upon writ of certiorari. Such applications for review to the Supreme Court are handled by the Board through the Solicitor General of the United States.

Credits
[53 FR 24440, June 29, 1988]

SOURCE: 52 FR 23968, June 26, 1987; 53 FR 24440, June 29, 1988, unless otherwise noted.

AUTHORITY: Sec. 6 of the National Labor Relations Act, as amended (29 U.S.C. 151, 156), and sec. 552(a) of the Administrative Procedure Act (5 U.S.C. 552(a)). Section 101.14 also issued under sec. 2112(a)(1) of Pub.L. 100–236, 28 U.S.C. 2112(a)(1).

Notes of Decisions (34)

Current through May 7, 2015; 80 FR 26430

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